**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | |
|---|---|
| **FRONTIER COMMUNICATIONS CORPORATION**<br><br>**and**<br><br>**COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13** | **Case 09-CA-247015** |

# RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS


MORGAN, LEWIS & BOCKIUS LLP

Christopher J. Murphy
christopher.murphy@morganlewis.com
1701 Market St.
Philadelphia, PA 19103-2921
Phone: +1.215.963.5601
Fax: +1.215.963.5001

Ryan T. Sears
ryan.sears@morganlewis.com
1111 Pennsylvania Ave. NW
Washington, DC 20004-2541
Phone: +1.202.739.5077
Fax: +1.202.739.3001

*Attorneys for Respondent*
*Frontier Communications Corporation*


Dated: December 2, 2020

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**U.S. Government Websites**

## I. INTRODUCTION

On October 14, 2020,[1] Administrative Law Judge Geoffrey Carter ("ALJ") issued his Decision ("ALJD") in this matter. Therein, the ALJ erroneously concluded that Respondent Frontier Communications Corporation ("Frontier" or "Company") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("NLRA" or the "Act") by failing and refusing to (1) "notify and provide the Union with an opportunity to bargain over the effects of Respondent's decision to require bargaining unit employees to provide new I–9 forms and supporting documentation" and (2) provide the Union with requested information, namely, "the specific deficiencies in each bargaining unit member's previously completed I–9 form and the current location and storage method for bargaining unit members' previously completed I–9 forms and any accompanying documents". ALJD at 23:3-5, 8-11.

The ALJ reached these conclusions even though the Company did nothing more than seek to comply with specific mandates of applicable federal immigration law. The Company sought to obtain valid Forms I-9 for all its employees solely to remedy its undisputed "massive" non-compliance with that law. Tr. 215:6. Frontier contends that because its compliance initiative was executed without discretion and limited solely to meeting a mandatory requirement of law, it had no obligation to bargain with the Union regarding any aspect of that initiative. Further, Frontier's efforts to have its Union-represented employees complete a Form I-9 did not change the terms and conditions of employment for those employees in the least. To the contrary, the employees' terms and conditions of employment always had included the requirement to provide a complete Form I-9 to the Company. Troublingly, the ALJ's

[1] All dates are 2019 unless otherwise indicated. This case arose from an unfair labor practice charge filed on August 21 by Charging Party Communications Workers of America, District 2-13 ("Union" or "CWA"). Following an investigation, a complaint issued in this case on December 10 ("Complaint").

conclusions indirectly endorses the Union's interference with the Company's targeted efforts to reach compliance and potentially subjected it to civil monetary penalties. The Board must reject the ALJ's conclusion on the effects bargaining issue.

The ALJ's conclusion that Frontier was obligated to provide the Union with the specific deficiencies in the incomplete or improper Forms I-9 it had on file for Union members is similarly flawed. Aside from the fact that Frontier had no obligation to provide that information in the absence of an underlying duty to bargain, the ALJ turned a blind eye to the Union's admitted objective to challenge each and every deficiency determination made by the Company. The Union sought this information for two related improper purposes – to thwart Frontier's compliance initiative and to encroach on its determinations regarding the completeness or correctness of any Form I-9. The Board must overrule the ALJ on this point, too.

Upon consideration of Frontier's exceptions,[2] the National Labor Relations Board ("NLRB" or the "Board") should sustain them, reverse the ALJ's findings and conclusions as appropriate, issue a decision concluding that the record evidence and applicable law does not establish that Frontier engaged in any of the unfair labor practices alleged in the Complaint, and issue an order dismissing the Complaint.

## II. STATEMENT OF FACTS

### A. Frontier's IRCA Compliance Regimen

The material facts in this case are concise and not in dispute. Frontier is a telecommunications company with about 16,400 employees. The Company operates in more than two dozen states in the country. Tr. 174:15-22 (Costagliola). For several years, the Company's Human Resources leadership had established a goal of being fully compliant with

[2] Frontier's exceptions to the ALJD are filed contemporaneously herewith and incorporated herein.

federal immigration law. Tr. 176:18-177:21 (Costagliola). Toward that end, Frontier acquired an immigration compliance software package, I-9 Advantage, in or around early 2018. Tr. 179:9-19 (Costagliola).

Beginning on April 1, 2018, Frontier required all newly hired employees to complete a Form I-9 online using that software. *Id.* In late 2018, Frontier began a corporate-wide Form I-9 compliance audit for its incumbent employees utilizing the software, consistent with its corporate compliance goal. Tr. 176:18-177:21 (Costagliola). Frontier engaged outside immigration counsel, Enrique Gonzalez, to review the audit data for every incumbent employee hired before April 1, 2018 and after November 6, 1986.[3] Tr. 179:9-19, 191:16-20, 195:1-16, 196:24-197:4 (Costagliola).

The audit was designed to bring the Company into compliance with the Immigration Reform and Control Act of 1986 ("IRCA").[4] This law, *inter alia*, prohibits an employer from employing an individual knowing that the individual is not authorized with respect to such employment; that is, the employee is not eligible to work in the United States. Tr. 183:3-13 (Costagliola); 8 U.S.C. § 1324a(a). An employer determines an individual's authorization to work by verifying his/her identity and employment authorization on the Form I-9. 8 U.S.C. § 1324a(b). Neither the IRCA, nor its implementing regulations, provides that any person or entity other than the employer makes this determination.

IRCA also requires employers to continuously maintain a correct and complete Form I-9

[3] This audit window covered the period between the implementation of the I-9 Advantage software for new hires and the date on which employers first became obligated to obtain and maintain Forms I-9 for employees. Pub. L. 99–603, 100 Stat. 3360 (Nov. 6, 1986) passage of Immigration Reform and Control Act of 1986; see also GC Ex. 2 at 1.

[4] *See* 8 U.S.C. § 1324a – Unlawful Employment of Aliens; see also 8 C.F.R. pt. 274a – Control of Employment of Aliens. (Collectively referred to herein as "IRCA" in reference to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which established the United States Code section codified at 8 U.S.C. § 1324a.).

on file for each current employee ("IRCA Record Requirement"). 8 U.S.C. § 1324a(a)-(b); *see also* 8 C.F.R. § 274a.2(b)(2). The failure to comply with this recordkeeping requirement is unlawful – an employer cannot continue to employ an individual for whom it does not have such a complete form on file – and subjects a non-compliant employer to significant monetary civil penalties. 8 U.S.C. § 1324a(e); *see also* 8 C.F.R. § 274a.10(b). IRCA compliance is a mandatory, non-delegable duty of all employers in the United States. 8 U.S.C. §§ 1101(b)(3), 1324a(a).

Frontier had completed its Form I-9 compliance audit by mid-June. Tr. 177:25-178:11 (Costagliola). Based on the audit results, Frontier concluded that it was massively non-compliant with the IRCA Record Requirement across its entire footprint. Tr. 178:1-23, 192:7-13, 195:10-16, 199:14-20 (Costagliola). Frontier, with assistance from counsel, concluded that it either had an incomplete or incorrectly completed Form I-9 or no record of a Form I-9 on file for as many as 15,000 of its employees ("Non-Compliant Employees") – ***a non-compliance rate of greater than 90%***. *Id*.

To remedy its non-compliance, on July 19, Frontier sent all Non-Compliant Employees an e-mail explaining that the IRCA Record Requirement required those employees to complete a new Form I-9.[5] J. Ex. 3. Per the July 19 email, Non-Compliant Employees had until August 8 to complete Step 1 of the Form I-9 (requiring the employee to attest to eligibility for employment in the United States) and until August 30 to complete Step 2 (requiring the employee to present documentation to Frontier supporting the attestation). Tr. 181:24-182:15 (Costagliola); J. Exs. 3, 4; GC Ex. 2. The entire process to complete a Form I-9 is not burdensome, taking only a couple

[5] . In fact, Frontier's Senior Vice President - Labor Relations, Robert J. Costagliola, received a copy of the July 19 e-mail, advising him that the Company did not have a complete Form I-9 on file for him. Tr. 181:13-19 (Costagliola).

of minutes. Tr. 181:23-182:5 (Costagliola).

Frontier's IRCA Compliance Regimen (conducting the audit, identifying Non-Compliant Employees, and obtaining complete Forms I-9 from them) ultimately was successful, with the vast majority of identified Non-Compliant Employees now being compliant. Tr. 202:4-6 (Costagliola). Notably, the Company achieved compliance voluntarily. Frontier did not discipline a single employee, did not remove a single employee from the payroll or work schedule, and did not otherwise subject any employee to any adverse impact. Tr. 201:16-202:9 (Costagliola). Indeed, the only consequence "suffered" by any Non-Compliant Employee was receipt of an e-mail from the Company notifying them of their non-compliance and, then, requiring them over the next six weeks to spend a few minutes completing a new Form I-9.[6] Tr. 201:16 (Costagliola); J. Ex. 3.

### B. The Parties' Communications About Frontier's IRCA Compliance Regimen

As discussed above, Frontier sent the July 19 e-mail to all its Non-Compliant Employees, including to West Virginia-based, CWA-represented employees in the bargaining unit at issue in this case ("WV Unit")[7], *see* J. Ex. 2 at 76-77. As noted, this e-mail advised the Union's non-compliant members that they had to complete Section 1 of the Form I-9 by August 8 and present documents evidencing authorization to work in the United States to complete Section 2 by August 30. J. Ex. 3; see also J. Ex. 4.

This communication spurred a series of e-mails between the parties:

- On July 23, the Union's Administrative Director, Letha "Lee" Perry, e-mailed Frontier's Labor Relations Director Peter Homes, seeking "confirmation" on certain issues regarding the July 19 e-mail and requesting that Homes provide her with a list of

[6] To the extent that some Union-represented employees in West Virginia persisted in their non-compliance with IRCA's mandates, the only consequence they "suffered" from this continued refusal was to receive additional e-mails reminding them to complete a Form I-9. J. Ex. 24 at 2.

[7] There was a small group of Virginia-based employees working out of the Company's Ashburn, Virginia facility included in the WV unit. J. Ex. 2 at 60.

employees in the WV Unit who received the July 19 e-mail. J. Ex. 5; see also J. Ex. 6.[8]

- On July 24, Homes e-mailed Perry responding to her questions and information request.[9] J. Ex. 8; see also J. Ex. 7. Regarding the list of employees receiving the July 19 e-mail, Homes advised that all WV Unit employees had received the July 19 e-mail, so a seniority list should suffice but that he would get back to her on this.[10] J. Ex. 8.

- On July 29, Perry e-mailed Homes and again asked him to confirm that employees who had previously completed a Form I-9 would not be required to complete the Form I-9 called for in the July 19 e-mail. J. Ex. 9.

- That same day, Homes responded stating that he could not confirm that point and that he was working to identify the universe of who received the July 19 e-mail (beginning the process of correcting his July 24 response to Perry). J. Ex. 10.

- On July 30, Perry again expressed her opinion to Homes that if an employee had previously filled out a Form I-9, then that employee should not have received the July 19 e-mail. J. Ex. 11.

- Later that day, Homes responded stating, "it's not as simple as whether or not they had previously completed a paper form." J. Ex. 12. He advised Perry that any employee receiving the July 19 e-mail was a Non-Compliant Employee required to complete a new Form I-9. He explained that completing a Form I-9 was a simple process mandated by federal law. *Id.*

- On July 31, Perry "objected]" to Homes' previous e-mail and specifically contended that Frontier's direction to the Non-Complaint Employees was not required by federal law. Specifically, Perry asserted that Frontier was seeking to ***re-verify*** the immigration status of WV Unit employees had completed a Form I-9 in the past.[11] J. Ex. 13.

---

[8] In this e-mail, Perry first expressed her mistaken belief that Frontier's July 19 e-mail was an inappropriate attempt to "***re-verify***" employees' work authorization status. J. Ex. 5. ***Re-verification*** is the process utilized when an employee's employment authorization or documentation of employment authorization has expired. *See* GC Ex. 2 at 12. Frontier did not ***re-verify*** the immigration status of any of its employees as part of its Immigration Compliance Regimen. Tr. 203:20-204:04 (Costagliola). Frontier's compliance efforts were only related to IRCA's Record Requirement.

[9] Homes also spoke with Perry on this date. This was the only conversation between them on this issue at any relevant time.

[10] At that time, Homes was mistaken on the scope of WV Unit employees receiving this e-mail. He corrected this statement on August 1, since only Non-Complaint Employees received the e-mail. J. Ex. 14.

[11] As noted, Perry contended that Frontier was seeking to ***re-verify*** Form I-9 compliance. Tr. 54, 20-22 (Perry) (Q. So in your mind, they were looking to just re-verify their documentation? A. Yes.); Tr. 56:23-57:5 (Perry); Tr. 107:1-11 (Perry). *See also*, Tr. 19:24-20:2 (CGC Opening) ("What Frontier was doing in effect was ***re-verifying*** the employees' work authorization, something that is not permitted under federal law."), Tr. 22:14-16 (Union Opening) ("the Union believes that the company's ***re-verification*** of substantially all covered employees' I-9 status is an overreach.").

• On August 1, Homes explained to Perry that, "[e]mployees who do not have a correctly completed Form I-9 are required to go through this process." J. Ex. 14. "Not having a correctly completed Form I-9 ranges from not having a Form I-9 at all to having an incomplete or improperly completed Form I-9." *Id.* This e-mail made clear that the Company's efforts were undertaken to comply with the federal statutory requirement to continuously maintain correct and complete Forms I-9. *Id*. Frontier did not seek to re-verify it employees Form I-9 compliance.

• Later that day, Perry requested that Homes provide her a list of the WV Unit employees who received the July 19 e-mail (since Homes had now clarified that this e-mail was intended only for Non-Compliant Employees). She also asked for a list specifying the employees with an incomplete or incorrectly completed Form I-9. J. Ex. 15.

• Later that day, Attorney Gonzalez e-mailed Perry. He reiterated that Frontier was asking employees to fill out the Form I-9 because it did not have a correct and complete Form I-9 on file for them, as required by federal law. J. Ex. 16. Gonzalez denied Perry's request for information on relevance grounds, as Frontier's actions were dictated by federal law. *Id*.

• On August 5, Perry e-mailed Homes reiterating her information request and "demand[ing] bargaining on the issue of the Company's request for completion of the I-9." J. Ex. 17. Notably, the Union did not demand to bargain over the effects of that decision.

• On August 8, Gonzalez wrote to Perry. He again explained that the Company's actions were dictated by federal law. J. Ex. 18. He further explained that the Company would not bargain with the Union given that this was simply an issue of legal compliance. He further advised that asking employees to complete this form did not materially impact the WV Unit. As a consequence, the information requested by the Union was not relevant. *Id*. Nevertheless, as a courtesy, Gonzalez provided Perry a list of all the Union-represented WV employees for whom Frontier did not have correctly completed Forms I-9. *Id.*

• That same day, Perry renewed her claim that Frontier was seeking to ***re-verify*** the immigration status WV unit members, which she contended was above and beyond the requirements of federal law. She further asked the Company to provide the specific deficiency for each non-compliant WV Unit employee and the current storage location of the Form I-9 records that the Company determined were deficient. J. Ex. 19. She sent a follow-up request on August 15. J. Ex. 20.

• After a six-week hiatus with no correspondence, on September 26, Homes informed Perry that the Company was going to send out a notification to remaining Non-Compliant Employees urging them to fill out the Form I-9. J. Ex. 21. Homes included a lengthy list of the WV unit employees that continued to be non-compliant. This

notification was never, in fact, sent to WV Unit employees. Tr. 201:2-202:9 (Costagliola).

- On October 2, Perry wrote to Homes again complaining that the Company was seeking to undertake an "unnecessary ***re-certification***" of employees' immigration status and reiterated the CWA's request "to bargain regarding the Company's requirement to complete an I-9 ***above and beyond what is required by federal law***." J. Ex. 22 (emphasis added).

- On October 21, Homes sent Perry a "global grievance denial" relating to all pending grievances on the issue of Frontier's IRCA Compliance Regimen, advising her again that these are not bargainable matters and not cognizable disputes under the CBA. J. Ex. 23.

- On October 24, Homes again informed Perry that he was going to send out a notification to remaining Non-Compliant Employees urging them to fill out the Form I-9. J. Ex. 28. As with the prior notice, this notification was never, in fact, sent to WV Unit employees. Tr. 201:2-202:9 (Costagliola).

- Following another six-week hiatus in correspondence, on December 9, Perry asked Homes to explain an e-mail that in fact was sent to a small number of still non-compliant WV Unit employees reminding them to please fill out a Form I-9. J. Ex. 24. Unlike the notices sent to Perry but not to the WV Unit employees, this notice did not mention any potential repercussion for failure to do so. *Id.* Homes explained that fact to Perry. J. Ex. 25. On December 10, Perry repeated the exact concerns she had expressed on August 8.[12] J. Ex. 26. On December 13, Homes reiterated the Company's position on those topics, e.g., that Frontier's I-9 compliance is not a bargainable matter. J. Ex. 27.

At the time of the last correspondence, Frontier had not taken any form of adverse action against any Non-Compliant Employee in the WV unit to obtain Form I-9 compliance. Further, there was no evidence that any employee in the WV unit had lost any pay or work opportunity as a result of completing Form I-9. Finally, there was no evidence that any employee in the WV unit had suffered any loss (e.g., identity theft) related to Frontier's storage of any previous submitted Form I-9. All of these facts were still true at the time of the hearing.

[12] See J. Ex. 19.

As of the hearing date, Frontier had achieved overwhelming compliance on its I-9 Compliance Regimen without any material impact of any sort on its Union-represented employees in the WV unit.

## III. ARGUMENT

### A. Frontier Had No Duty to Bargain. [Exceptions 1, 4-16, 18-19]

#### 1. The ALJ Wrongly Concluded That Respondent's July 19 Request to Employees to Complete a Form I-9 Was a Mandatory Subject of Bargaining. [Exception 4]

The ALJ wrongly and gratuitously concluded that Frontier was obligated to bargain over its decision to require its Non-Compliant Employees to complete a Form I-9. ALJD at 18, 5-7 ("As a preliminary matter, I find that Respondent's requirement (prompted by the audit) that employees submit new I–9 forms is a mandatory subject of bargaining because the requirement affects terms and conditions of employment."). The Board should overturn this unnecessary conclusion as this case was limited solely to the issue of whether Frontier must bargain over the ***effects*** of its July 19 request. The decisional bargaining issue was neither alleged, nor litigated. The operative paragraphs of the Complaint do not contain any allegation that Frontier had a decisional bargaining obligation on this issue. Complaint at ¶¶ 7, 8. Further, this issue was not litigated at the hearing. In fact, the ALJ specifically rejected the Counsel for the General Counsel's ("CGC") attempt at the hearing to amend the complaint to include a decisional bargaining allegation.[13] Tr. 61-68; *see* Complaint ¶ 7. Thus, to the extent the ALJ purports to have found that the Respondent had a duty to bargain about its decision to ask Non-Compliant Employees to complete a Form I-9, this conclusion should be set aside as outside the scope of the

[13] The CGC did not renew his request to amend the Complaint later in the hearing or in his post-hearing brief.

proceeding.[14] *Dalton Sch*., 364 NLRB No. 18, 2016 WL 3124636, at *2 (June 1, 2016) (rejecting judge's finding because the employer was not put on notice that the pertinent facts would be used to prove a separate violation, and therefore the Respondent did not have the opportunity to mount a defense); *Teamsters Gen. Local Union No. 200*, 357 NLRB 1844, 1845 (2011) (judge improperly found a violation as his statements in response to the General Counsel's motion on the first day of hearing to add the allegation led the employer to reasonably believe that it would not have to defend against that allegation).

2. The Union Never Requested that Frontier Bargain Over the Effects of Its Decision to Require Employees in the WV Unit to Complete New Forms I-9. [Exceptions 5, 7, 10-12, 18]

As shown above, the Union repeatedly and incorrectly contended in 2019 and at the hearing that Frontier attempted to "***re-verify***" the IRCA compliance status of employees in the WV Unit. The Union further contended that ***"re-verification"*** was not required by the IRCA and was, in fact, not permitted under that law, except in limited situations.[15] Tr. 54:12-22, 107:1-11, 84:9-11; J. Exs. 22, 26. The Union apparently never grasped (or was simply unwilling to accept) that to cure its massive non-compliance, Frontier was seeking initial, legally compliant, ***verification*** records of its Non-Compliant Employees' authorization to work in the United States.

Due to its misunderstanding of, or unwillingness to accept, Frontier's objective, the Union repeatedly demanded that Frontier engage in decisional bargaining over what it viewed as

[14] The ALJ undermines his conclusion on this issue in several places in the ALJD. For example, in the paragraph following his superfluous conclusion on this point, the ALJ wrote: "Respondent's position that it did not have to bargain over the decision to require new I–9 forms arguably has merit, insofar as Respondent's audit of its I–9 forms established extensive noncompliance and Respondent is required by law to obtain a valid I–9 form for each employee." ALJD at 18, 24-27. Further, despite making this erroneous and unnecessary conclusion, the ALJ does not mention it in his conclusions of law or in the remedial part of the ALJD. ALJD at 22-23.

[15] ***Reverification*** occurs when an employer asks employees to present their documents an additional time to prove that they are authorized to work. Usually an employer does this because the document an employee presented showed that the employee had temporary authorization to work and that authorization has expired or is about to expire. For example, reverification may occur when an employee's employment authorization document has expired. GC. Ex. 2.

an unnecessary and unauthorized compliance process. Tr. 84:9-11 (". . . we weren't aware of any law that required multiple completions of the I-9 form."). The Union's insistence on decisional bargaining is clear from the face of Perry's e-mails. J. Exs. 17, 19, and 26.

Also clear from Perry's correspondence is the fact that the Union never requested that Frontier engage in effects bargaining regarding the Company's decision to require non-compliant WV unit members to complete Forms I–9. *Id*. At the hearing, Perry never identified when or how the Union had requested effects bargaining. And, the ALJ failed to make a specific factual finding in the ALJD that the Union sought effects bargaining on a date certain, despite a thorough review of Perry's e-mails.[16] ALJD at 14:10-18; ("However, [the Union] is not aware of any law requiring an employee to complete multiple I–9 forms except in the case of non-citizens whose documentation has an expiration date. [The Union] requested that you provide an adequate legal justification for this duplicative and unnecessary ***re-certification*** of employees' immigration status, but you have not done so. The Company has neglected to respond to [the Union's] multiple requests to bargain regarding the Company's requirement to complete an I–9 above and beyond what is required by Federal law. The Company has refused to participate in productive discussion or to provide information to support its claim that Federal law dictates its actions and that deficiencies exist in previously completed I–9s.") (quoting from J. Ex. 22 (emphasis added)); *see also* Tr. 83–86. In her many e-mails protesting the Company's compliance efforts, Perry never once used the word "effects."

The ALJ failed to consider the motivation for the Union's obstruction of Frontier's compliance initiative. Whether the Union believed (wrongly) that it was opposing unlawful "***re-verification***", it was irritated that it had to deal with a situation it thought resolved in 2013, it

[16] The ALJ never mentioned, let alone accounted for, the Union's focus on re-verification and how the Union's bargaining demands related to that concept.

simply felt disrespected by not having received advance notice, or all of the above, the record established that the Union did nothing to advance Frontier's compliance initiative. There was no evidence that the Union encouraged its members to complete Forms I-9. There was no evidence that the Union facilitated the Company's efforts to comply with federal immigration law. From the Company's perspective, the Union's conduct constituted outright obstruction and interference. This conclusion was supported by reports from employees that the Union was, in fact, thwarting the Company's efforts. Tr. 216:2-7 (Costagliola); *see also Id.* at 200:16-21, 215:17-22. Furthermore, the Union's members and those of two other CWA Districts made up a significant and disproportionate percentage of the Non-Compliant Employees. This was no coincidence, as the Union actively interfered with the IRCA Compliance Regimen.

Properly viewed, the Union's communications and Perry's testimony are inconsistent with a desire to engage in effects bargain – a process that begins only when the underlying decision (here, the IRCA Compliance Regimen) is implemented. In this case, the Union ***never*** acknowledged Frontier's right and legal obligation to obtain complete Form I-9 as ***initial*** verification of work authorization. To the contrary, the Union contested Frontier's compliance efforts, which it wrongly labeled "***re-verification***." By resisting compliance under the guise of preventing ***re-verification***, the Union demonstrated that it never sought to bargain over the effects of Frontier's IRCA Compliance Regimen.

In sum, the record is crystal clear that the Union never requested that Frontier engage in effects bargaining over any aspect of IRCA Compliance Regimen. In the absence of an appropriate request, Frontier had no obligation to engage in effects bargaining with the Union. *Jim Waters Resources*, 289 NLRB 1441 (1988) (If a union is given timely notice of the employer's decision, then the union generally must request bargaining over the effects of the

decision); *Bell Atl. Corp.*, 336 NLRB 1076, 1088-89 (2001) (Unions' failure to formally request bargaining rendered employer's action immune from a unilateral change allegation); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (same).

3. Even Assuming Arguendo that the Union Had Made an Effects Bargaining Request, Frontier Did Not Have An Effects Bargaining Obligation Regarding Its Actions in This Case Because They Were Mandated by IRCA. [Exceptions 7-9, 16, 19]

Contrary to the ALJ's erroneous conclusion, Frontier did not have an obligation to bargain with the Union over the effects of its decision to require non-compliant WV unit employees to complete a Form I-9 because its actions were mandated by the IRCA. Notably, an employer's compliance with mandates of federal law is not a mandatory bargaining subject. *See, e.g.*, *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993) (company lawfully unilaterally adopted a rule related to pay practices as part of action to comply with federal maritime law); *Long Island Day Care Servs., Inc*., 303 NLRB 112, 117 (1991) (unilaterally increasing employee salaries per a federal directive was lawful, employer lacked discretion regarding compliance with directed salary enhancement); *Tri-Produce Co.*, 300 NLRB 974, 984 (1990) (unilateral IRCA compliance lawful because IRCA imposes a "non-negotiable duty" upon employers); *Murphy Oil USA, Inc.*, 286 NLRB 1039, 1039, 1042 (1987) (legally required unilateral changes to work-related conditions were lawful); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (company did not violate the Act by unilaterally adopting wage changes in order to comply with federal law); *S. Transp., Inc.*, 145 NLRB 615, 617-18 (1963) (unilaterally changing wage rates and method of payment to comply with federal law was lawful), *enforced*, 343 F.2d 558 (8th Cir. 1965).

Here, Frontier required its Non-Compliant Employees to complete a Form I-9 in order to comply with IRCA's Record Requirement; this requirement included numerous WV unit members. J. Ex. 18:2-18 (listing non-compliant WV unit members). As explained above, the

IRCA obligated Frontier to maintain for inspection correctly completed Forms I-9 for each and every one of its current employees, including those in the WV Unit. 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b). The IRCA dictated that, if the Company did not possess such a compliant Form I-9, it could not legally continue to employ that non-compliant employee. 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b). Indeed, when it launched its I-9 compliance initiative, the Company was technically and legally in violation of IRCA by continuing to employ the majority of its workforce, including those non-compliant employees in the WV unit. Further, the Company was subject to being audited by U.S. Immigration and Customs Enforcement. If Frontier was determined to be out of compliance, it would be subject to potential civil monetary penalties ranging from $230 to $2,292 per Non-Compliant Employee. 8 C.F.R. § 274a.10(b)(2). Federal law mandates both the use of the Form I-9 and the process to complete it. *E.g.*, 8 U.S.C. § 1324a(a).

Here, Frontier's internal compliance audit disclosed massive non-compliance with the IRCA. In these circumstances, Frontier had no alternative but to direct its Non-Compliant Employees, including those in the WV unit, to complete a Form I-9. Frontier did not exercise any discretion in responding to the audit results to promptly achieve compliance with the IRCA Record Requirement. It did nothing more or less than what the law mandated.[17] For this reason, Frontier's requirement that its Non-Compliant Employees complete a Form I-9 in order to comply with IRCA's Record Requirement was not a mandatory subject of bargaining. Simply,

[17] Note that in seeking compliance, Frontier made no discretionary or voluntary choice, such as utilizing E-Verify. *cf. Ruprecht Co.*, 366 NLRB No. 179, slip op. at 17-18 (Aug. 27, 2018) (company's unilateral enrollment in the E-Verify system, a voluntary program which is neither statutorily mandated nor required, violated Section 8(a)(5)). Here, Frontier did not use E-Verify. It merely fulfilled its non-negotiable duty to comply with IRCA.

there was nothing to bargain about, as the parties were powerless to change the mandates of the IRCA.

The ALJ's attempts to distinguish the Board cases relied by Frontier on this issue are as unavailing as his attempt to concoct a factual basis for his conclusion that Frontier's actions were in any way "discretionary." ALJD at 19:4-25. For example, in *Long Island Day Care Services*, 303 NLRB 112 (1991), the employer received about $115,000 in federal grant money. *Id.* at 116. The receipt of the grant was conditioned on the employer's application of at least about $75,000 (or 65%) of the money to its employees. *Id.* Upon receipt, the employer decided to distribute all of the money to its employees in the form of 4.75% salary increases. *Id.* The Board held this was improper because the employer exercised its discretion to allocate 100% of the money to its employees, as compared to 65% of the money it was required to allocate as a condition of the grant. *Id.* Due to its exercise of discretion regarding a wage increase (a mandatory subject of bargaining), the employer was required to have provided pre-implementation notice and an opportunity to bargain to the union. *Id.* at 116-17. The Board distinguished this conduct from a subsequent circumstance wherein the employer lawfully provided 100% of grant money received from another federal grant exclusively to its employees' wages, amounting to a 2% increase. *Id.* at 117. The Board found that unilateral action lawful because that grant required the employer to allocate all money to employee wages. *Id.* at 117. Consequently, the employer did not exercise discretion in deciding to allocate the money in this way, it simply complied with the grant's terms. *Id.*

By misapplying *Long Island Day Care Services*, the ALJ erroneously concluded that Frontier's actions were akin to the ***discretionary*** 4.75% increase as compared to the ***mandatory*** 2% increase. Here, IRCA mandated that Frontier obtain correct and complete Forms I-9 for all

of its Non-Compliant Employees, including those in the WV unit. Frontier acted pursuant to the IRCA; it exercised no discretion in that regard. Contrary to the ALJ, *Long Island Day Care* supports a conclusion that the Company was not required to bargain about these issues.

The ALJ's attempt to distinguish *Standard Candy Co.*, 147 NLRB 1070 (1964) is similarly unavailing. In *Standard Candy,* the employer was required to increase wage rates to meet the minimum federal wage. *Id.* at 1073. However, the employer also decided to raise the wages of certain employees already paid above the minimum in order to maintain a wage differential between its employees. *Id.* This further change by the employer was purely discretionary and not legally mandated. Therefore, the employer was required to have provided notice and an opportunity to bargain before implementing that unilateral change. *Id.*

Frontier's actions here are akin to the employer's FLSA-mandated payment of the federal minimum wage to its employees. Moreover, unlike a FLSA-mandated pay increase, Frontier's legally mandated actions here had no impact on a term or condition of employment. Frontier did not take any action beyond that mandated by the IRCA and it did not exercise any discretion in requiring that its Non-Compliant Employees submit complete Forms I-9. Accordingly, Frontier's actions are analogous to the lawful unilateral wage increase in *Standard Candy*.

4. Even Assuming Arguendo that the Union Had Made an Effects Bargaining Request, Frontier Did Not Have an Obligation to Bargain Over the Effects of Its Requirement That Non-Compliant Employees Complete a Form I-9 Because There Was No Impact on Terms and Conditions of Employment.. [Exceptions 6, 13-15]

When bargaining over a particular decision is not required because the decision does not address wages, hours or terms and conditions of employment, an employer may still be required to engage in bargaining over the effects of the decision "in a meaningful manner and at a meaningful time." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). However, effects bargaining is not required when the decision at issue does not meaningfully

impact an employee's terms and conditions of employment. *The Bohemian Club*, 351 NLRB 1065, 1066 (2007). That is, there must be evidence that the unilateral change was a "material, substantial, and significant" change to employees' existing terms and conditions of employment. *See Carey Salt Co*., 360 NLRB 201, 212 (2014); *Peerless Food Products*, 236 NLRB 161, 161 (1978). The unilateral change at issue is assessed "by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co*., 284 NLRB 1205, 1205 fn. 1 (1987), enfd. 852 F.2d 572 (9th Cir. 1988). Further, a disputed change is not material, substantial and significant merely because it achieves the purpose for which it was instituted. *See Rust Craft Broadcasting*, 225 NLRB 327 (1976) (to improve accuracy, a unilateral change to a timekeeping system requiring employees to punch a time clock is not a material, substantial, and significant change from the prior requirement that employees handwrite the cards).

Here, the ALJ wrongly concluded that Frontier was obligated to bargain with the Union over the effects of its July 19 e-mail to non-compliant WV unit employees requiring them to complete a Form I-9. ALJD at 23:3-6; 18:13 n.12; 18:22-19:2; 19:27-36. The ALJ erred on this point because Frontier's requirement that the non-compliant WV unit employees complete Forms I-9 did not affect the terms and conditions of employment of those employees in a "material, substantial, and significant" way. As a factual matter, neither the ALJ, nor the adverse parties, identified any actual term or condition of employment that was meaningfully impacted by the Company's compliance requirement.[18] In fact, the requirement that WV unit members

[18] When asked on cross-examination to identify the changed employment terms related to Frontier's Form I-9 requirement, Union witness Perry stated: "They were threatened with discipline. They were required to produce documents that they had produced previously and threatened with discipline if they did not do so." Tr. 115:25-116:4. First, it is important to note that at the time the Union made its requests for information, Frontier had not even raised the potential to the Union (let alone to employees) that non-compliant employees could be removed from the work schedule, pending compliance. Frontier did not raise that potential response to the Union until September 26. J. Ex. 21. As previously noted, Frontier never communicated that potential response to non-compliant WV unit

have a complete Form I-9 on file with Frontier is, was, and at all times has been a legally-imposed condition of employment of all of the WV unit employees. Thus, Frontier's requirement that non-compliant WV unit employees have such a form on file did not "depart[ ] from the existing terms and conditions affecting employees." *Southern California Edison Co*., 285 NLRB at 1205 n.1.

To support his conclusion, the ALJ resorted to sophistry, conjuring up an impact utterly unsupported by the record. ALJD at 18, 10-13 (". . . Respondent's requirement that employees complete new I–9 forms clearly affects terms and conditions of employment, as employees who (for whatever reason) have difficulty completing the I–9 form risk losing their jobs, among other potential consequences."). There was no evidence presented at the hearing that any employee had difficulty completing a Form I-9.[19] In fact, the evidence was that completing the form was a simple task that required little time. Tr. 181:23-182:5 (Costagliola). Likewise, and as stated above, there was no evidence at the hearing that any non-compliant WV unit member suffered any form of adverse consequence. Moreover, the e-mail notifications sent by Homes to Perry that referenced potential adverse consequences (J. Exs. 21, 28) were not sent to any WV unit employee.[20] Tr. 201:18-19; ALJD 12:21-23, 15:30-32. There was no testimony that any non-compliant WV unit member saw or learned of these e-mails; therefore, those employees could not have been impacted by them. The e-mails that Frontier actually sent to employees made no mention of the potential consequences of continued non-compliance. J. Exs. 3, 4, 24 at 2. In

members. There is no evidence in the record of any such communication having been made to any bargaining unit member.

[19] In fact, when Perry raised the potential issue of employees having trouble completing the Form I-9 by August 30, Homes advised that "[i]f an employee document is lost they can produce a receipt from the Social Security Admin and this is acceptable for 90 days." J. Ex. 8 at 3.

[20] As the record shows, the Union improperly obstructed Frontier's I-9 compliance initiative by instructing or encouraging employees not to comply. Tr. 216:2-7 (Costagliola); *see also Id.* at 200:16-21, 215:17-22; J. Ex. 21 at 45. Given those actions, the Company's notification to only the Union of potential discipline were attempts to discourage the Union from wrongly impeding the process.

short, there is no factual support in the record to support the ALJ's conclusion that the Company's I-9 compliance requirement materially, substantially and significantly impacted any term or condition of employment.

The ALJ's citation to *Ruprecht Co*., 366 NLRB No. 179 (2018) and *Washington Beef, Inc.*, 328 NLRB 612 (1999) also do not support his flawed conclusion. *Ruprecht* involved an employer's use of the E-Verify system, a ***voluntary*** government program to verify the validity of employee-provided social security numbers.[21] 366 NLRB at 1, n.3. Here, IRCA compliance is a mandatory, non-delegable employer obligation. Unlike the employer in *Ruprecht*, Frontier did nothing more than it was required to do under federal law – obtain a complete Form I-9 from its non-compliant employees. [22]

*Washington Beef* is legally and factually inapposite and, if relevant at all, actually supports Frontier's position.[23] In that case, the Board agreed with the ALJ that the employer violated the Act "by refusing to bargain with the Union regarding the amount of time which will be given to the unit employees to establish that they possess authentic work documents." 328 NLRB at 612, n.2. Notably, this case was not an effects bargaining decision. *Id*. at 613. Further, the relevant request to bargain came ***after*** the employer already had placed an employee

[21] "E-Verify is a web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States. E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees on the Form I-9, Employment Eligibility Verification, against records available to the Social Security Administration (SSA) and the Department of Homeland Security (DHS). E-Verify is a voluntary program." https://www.e-verify.gov/ (visited on December 1, 2020) (Official Website of the Department of Homeland Security and USCIS).

[22] As noted above, the CGC and the Union fundamentally misunderstood the Company's rationale for requiring WV unit members to complete a new Form I-9. Their theory of the case was that Frontier was seeking to ***re-verify*** its employees' compliance status and, therefore, those efforts were "above and beyond" the requirements of the IRCA. Tr. 19:25-20:2 (Pincus); Tr. 22:14-16 (Richardson). The evidence demonstrated, however, that Frontier did not reverify any employee's IRCA status. Rather, its efforts were solely related to complying with IRCA's Record Requirement. Tr. 203:24-204:4 (Costagliola).

[23] Reasoning that an employer upon discovering that it did not possess a valid Form I-9 for its employee must obtain such a form or terminate his employment within a reasonably prompt period of time. 328 NLRB at 620 (and cases cited therein).

on a three-day unpaid leave of absence (indisputably a material change to employment terms) to produce documents establishing his right to work. *Id.* at 616-17.[24] In other words, the issue there was whether an employer must engage in ***decisional*** bargaining over the amount of time an employee has to produce evidence of eligibility after being removed from the schedule, on pain of termination.[25] *Id*. That issue is simply not presented in this case. Here, no employee was terminated, disciplined or otherwise adversely impacted by being required to complete a Form I-9. Indeed, here the Company did not enforce any of the deadlines it had communicated to the Union and the Non-Compliant Employees in the WV unit for completion of each step of the Form I-9. Tr. 171:3 (Perry), Tr. 201:16 (Costagliola). Thus, there was no adverse employment decision over which to bargain.

Finally, the ALJ's attempt to draw an analogy between Company's I-9 Compliance Regimen, mandated by federal law, and an employer's discretionary promulgation of a "new disciplinary rule" badly misses the mark. ALJD at 18, n.12. Indisputably, Frontier was obligated to comply with the mandatory dictates of federal immigration law. Frontier's situation has nothing in common with an employer's discretionary action in establishing a new disciplinary rule. Frontier did not impose some type of new discretionary requirement upon its employees in the WV unit. The Company did nothing more or less than it was legally obligated to do – comply with IRCA's Record Requirement. Every employee lawfully working for every employer in the United States is subject to the same requirement to complete a valid Form I-9. Frontier did not have a correct and complete Forms I-9 for each Non-Compliant Employee, so it required them to complete one to comply with the law. Because following IRCA's long-

[24] The employee produced valid documentation and was permitted to retain employment. *Id*. at 617.
[25] The ALJ's commentary in *Washington Beef* that an employer and a union should bargain "while no INS letter is pending—at a time when the parties have time for an exchange of ideas and reflection" is dicta and of no persuasive value in this case, involving different factual and legal contexts. *Id.* at 620, n.9.

standing requirements did not in fact effectuate any change to WV unit employees' conditions of employment, Frontier was not required to provide the Union an opportunity to effects bargain about this.

a. The ALJ Improperly Conflated Topics that Frontier ***Could Have*** Bargained Over with Topics that It ***Must*** Bargain Over. [Exceptions 12-15]

The ALJ wrongly concluded that because there were topics that the parties' ***could have*** discussed relating to Frontier's compliance with IRCA's Record Requirement, Frontier was ***required*** to bargain over these issues with the Union in connection with requiring its I-9 Compliance Regimen.[26] ALJD at 18:29-33, 19:29-34. The ALJ's logic is flawed in several respects. First, the fact that the parties could have bargained over certain matters is irrelevant because the decision at issue – requiring Non-Compliant WV unit members to complete a Form I-9 – did not impact those employees' employment terms. Without a meaningful impact on such terms, no effects bargaining obligation arose with respect to any of the hypothetical issues identified by the ALJ.

Second, the fact that these parties had addressed a similar issue in 2013 is irrelevant. It is true that in 2013, the Company and the Union met and discussed certain concerns the CWA had regarding the Company's I-9 compliance initiative. However, Frontier made it clear it entered those discussions voluntarily. It advised the Union that it "flatly disagree[d]" that the Company had any legal requirement to bargain over these issues because these topics were not mandatory subjects of bargaining. R. Ex. 1; Tr. 187:10-23, 109:7-12 (Costagliola). The CGC conceded on

[26] In 2013, Frontier attempted to remediate its non-compliance with IRCA's Record Requirement for the WV Unit employees. To put it mildly, that process was botched. For example, Frontier accepted, for purposes of Section 2 of the Form I-9, random and invalid documents, such as hunting and firearms licenses. Tr. 211:25-212:24 (Costagliola). In 2013 the Union objected to the Company's efforts to comply with IRCA's Record Requirement, but ultimately abandoned its resistance after the Company ***voluntarily*** consulted with the Union, in order to facilitate CBA negotiations. The Company, however, specifically preserved its position that it was not obligated to bargain. R. Ex. 1; J. Ex. 5; Tr. 184-188 (Costagliola).

the record that events in 2013 had no bearing on the events of 2019. Tr. 129:1-7 (I'm going to object as to relevance. This line of questioning just doesn't seem to have anything to do with the obligation the bargaining effects now. Whatever resolution the union and the company reached then [in 2013] is not binding as to the scope of any possible resolution now."). The ALJ's suggestion that Frontier's voluntary discussion of similar from 6 years' ago – under a specific reservation of rights – is somehow evidence of an obligation to bargain with the Union in 2019 is misplaced. The fact that Frontier chose to act in one manner in 2013 is not evidence of its obligation to do so in 2019. Further, the ALJ's reliance on these 2013 discussions would act as a serious disincentive for parties to engage on issues on a voluntary, non-mandatory basis.

Third, Frontier concedes that if any part of its IRCA Compliance Regimen had resulted in any material change to employees' employment terms, then that part of the program could give rise to a decisional bargaining obligation, as was the case in *Washington Beef*, *supra*. For example, ***if*** Frontier had informed employees that they would be removed from the work schedule because the Company did not a possess a correct and complete Form I-9 for them, then Frontier arguably would have first been required to provide notice to the Union and an opportunity to bargain about any such removal.[27] However, because Frontier never actually told any employee that it would not permit them to work, let alone actually prevent them from working, the Company never took any action that would have changed employment terms. [28]

Contrary to the employer in *Washington Beef*, Frontier never removed any employees from the schedule, or even informed them that it would, so any ***potential*** bargaining duty was

[27] Any such action by Frontier would have been analogous to the three-day, unpaid leave of absence in *Washington Beef*.

[28] The ALJ's other examples are clearly unrelated to employment terms as they speak to Respondent's internal record storage practices and these would never be appropriate for bargaining at any point in time. ALJD 19:30-34.

never triggered. While Frontier could have voluntarily engaged with the Union about the topics identified by the ALJ, it had no legal obligation to do so.

### B. Because There Was No Duty to Bargain, There Cannot Be a Violation for Failure to Provide Information. [Exceptions 2, 17-24]

The ALJ also erred in concluding that Frontier violated the Act by refusing to provide the Union the specific deficiency(ies) the Company had identified in each non-compliant Form I-9 previously submitted by members of the WV unit and information regarding the location and storage method for those previously completed Forms I–9. ALJD at 23:8-13. Frontier did not violate the Act in this regard because, as shown above, it had no underlying duty to bargain.

When an employer is not obligated to bargain with a union over an issue, the employer has no obligation under Section 8(a)(5) of the Act to provide related information. *See, e.g.*, *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 694 (1993) (employer had no obligation to provide requested information relating to matter employer was not obligated to bargain about); *BC Indus., Inc.*, 307 NLRB 1275, 1275 n.2 (1992) (because employer had no statutory obligation to bargain about issue, employer had no duty to furnish information); *Ador Corp.*, 150 NLRB 1658, 1660-61 (1965) (employer was under no obligation to consult with union over the issue, therefore, it did not violate Section 8(a)(5) by withholding information on the issue). This black letter law should end this inquiry. The ALJ's conclusion that Frontier unlawfully refused to provide the Union with the requested information should be overturned.

Further, the ALJ failed to consider that the Union did not ask the Company to provide it with the specific deficiency(ies) in each non-compliant WV Unit employee's From I-9 in order to discuss the hypothetical effects bargaining topics identified in the ALJD.[29] To the contrary,

[29] The Union had raised certain concerns similar to the ALJ's hypothetical concerns in Perry's July 23 e-mail to Homes. J. Ex. 5. Homes addressed the Union's concerns in his responsive e-mail, dated July 24. J. Ex. 8. Except

the Union candidly admitted that it sought that information in order to challenge – on an employee-by-employee basis – the specific compliance determinations made by the Company with its immigration counsel's advice. Tr. 117:4-120:7 (Perry). The ALJ acknowledged the Union's purpose for requesting this information, in part, was to challenge Frontier's audit conclusions. ALJD. 22 n. 17.[30] However, he illogically concluded that Union did not intend to use that information to "encroach[ ] upon or affect[ ] Respondent's IRCA compliance efforts." *Id*. Given Perry's admission that the Union sought individual deficiency information so that employees disagree with the Company's individual compliance determination (Tr. 119:3-4), the ALJ had no factual basis from which to conclude that the Union and its members did not intend to "encroach[ ] upon or affect[ ]" Frontier's IRCA compliance efforts.

The ALJ also failed to consider appropriately Frontier's evidence that it did not maintain the individual deficiency information in the format requested by the Union. Costagliola testified that Frontier does not have the ability or capability to create a document that disclosed employee by employee I-9 discrepancies in the manner the Union envisioned and that creating such a list would require Frontier to manually create, via a person-by-person review of the thousands of WV Unit Non-Complaint Employees, this information. Tr. 196:25-197:4 (Costagliola). The ALJ improperly concluded that Frontier should be ordered to produce this list because the list of data does not currently exist and there is no obligation for Frontier to create a document to respond to an information request, particularly when it would be extremely burdensome to do so.

---

to renew its request for information, the Union never revisited any of the concerns that it had raised and Homes had addressed.

[30] As he did with the effects bargaining issue, the ALJ contrived a list of potential issues the Union ***could have*** used the requested information to address: "verifying that the deficiencies in previously completed I–9 forms were as extensive as Respondent maintained; advising its members about what errors to avoid when completing the new I–9 forms; and bargaining with Respondent over a process for employees to submit new I–9 forms and/or correct any deficiencies in the previously existing or new I–9 forms." *Id*. Except for the first time in the list, there was no evidence presented at the hearing relating to any of the other items. The ALJ made these up out of whole cloth.

Finally, the ALJ erroneously concluded that the Company was required to produce information related to location and storage method for WV unit members' previously completed Forms I-9. ALJD at 23:10-11; 22:15-20. The issue underlying this request – where and how the Company stores documents it is required by law to maintain[31] – is not a term or condition of employment. Therefore, Frontier had no obligation to bargain over it and, derivatively, no obligation to provide related information. *See ABM I Bus. & Indus.,* NLRB Case No. 13-CA-259139, slip op. a 1; 2020 WL 4924273, at *2 (Advice Response Memo dated July 9, 2020) (NLRB General Counsel directing dismissal of a similar allegation because "the company's document retention policy [is] … not … relevant because it d[oes] not relate to employees' terms and conditions."). Had the Union produced any evidence that any of its members' personal information contained on a Form I-9 had been "hacked" or misappropriated in some fashion, then perhaps the document retention request could have been relevant. In the complete absence of any such evidence, however, Frontier clearly had no legal obligation to provide such information. The parties having discussed this issue in the past does not somehow make this information relevant now, as the underlying bargaining duty remained at all times non-existent.

## IV. CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Board to find merit in its Exceptions to the Administrative Law Judge's Decision and to dismiss the Complaint in its entirety.

[31] Employers must keep Forms I-9 for all current employees. 8 U.S.C. 1324a. For terminated employees, the form must be retained for at least three years from the date of hire or for at least one year after the termination date, whichever comes later. *Id.*

Dated: December 2, 2020

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Christopher J. Murphy/rts*

Christopher J. Murphy
christopher.murphy@morganlewis.com
1701 Market St.
Philadelphia, PA 19103-2921
Phone: +1.215.963.5601
Fax: +1.215.963.5001

Ryan T. Sears
ryan.sears@morganlewis.com
1111 Pennsylvania Ave. NW
Washington, DC 20004-2541
Phone: +1.202.739.5077
Fax: +1.202.739.3001

Attorneys for Respondent
FRONTIER COMMUNICATIONS
CORPORATION

## CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I caused a copy of the foregoing Respondent's Brief in Support of Exceptions in NLRB Case No 09-CA-247015 to be delivered to the following individuals:

Stephen Pincus
Noah Fowle
Counsel for the General Counsel
National Labor Relations Board - Region 8
1240 E. 9th Street, Room 1695
Cleveland, OH 44199-1086
stephen.pincus@nlrb.gov
noah.fowle@nlrb.gov
Via E-mail

Matthew T. Denholm
Regional Director
National Labor Relations Board - Region 9
550 Main Street, Room 3-111
Cincinnati, OH 45202-3271
Matthew.Denholm@nlrb.gov
Via E-mail

Letha Perry
Administrative Director
Communications Workers of America, District 2-13
Charging Party
900 Lee Street East, Suite 1212
Charleston WV 25301
Lperry@cwa-union.org
Via E-Mail

Joseph Richardson
Attorney for Charging Party
Willig, Williams & Davidson
1845 Walnut St., 24th Fl.
Philadelphia, PA 1910
jrichardson@wwdlaw.com
Via E-Mail

I then e-filed the same document that same date with the Executive Secretary of the National Labor Relations Board in Washington, DC.

*/s/ Ryan T. Sears*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: +1.202.739.5077
Fax: +1.202.739.3001
Email: ryan.sears@morganlewis.com
*Attorney for Respondent*
*Frontier Communications Corporation*
Dated: December 2, 2020